APPENDIX

"APPENDIX A"

IN THE UNITED STATES COURT OF CLAIMS

No. 50418

(Decided November 8, 1955)

JOSEPH M. CAIN v. THE UNITED STATES

Mr. Albert B. Arbaugh for plaintiff.

Mr. J. W. Hussey, with whom was *Mr. Assistant Attorney General H. Brian Holland*, for defendant. *Messrs. Andrew D. Sharpe* and *Ellis N. Slack* were on the brief.

Opinion

JONES, *Chief Judge*, delivered the opinion of the court:

This is a suit for refund of additional income taxes which plaintiff claims were improperly assessed for the years 1943 and 1944. The amount claimed as overpayment is $72,979.77.

The plaintiff has been a licensed dentist since the year 1915 and has been practicing in Canton, Ohio. Upon graduation in that year he became a partner of his father, Dr. H. O. Cain. The father, Dr. H. O. Cain, gradually withdrew from the practice of dentistry until 1941 at which time he began devoting his entire time to banking matters. The partnership name, however, Cain & Cain, was continued in use by the plaintiff who from time to time employed other dentists on a salary. He also operated a dental laboratory for the making of artificial dentures.

The plaintiff's son, Dr. Charles C. Cain, was born July 10, 1916. From the time of his birth the plaintiff had anticipated his son's entry into the partnership with plaintiff in the practice of dentistry and held out the prospect of

such a partnership as an inducement to Charles C. Cain to prepare himself well for the profession.

The son was graduated from dental school in June 1942 and was admitted to practice his profession on August 5, 1942. The war was on and while in dental school Dr. Charles C. Cain received a Navy commission as a probationary ensign and was commissioned a lieutenant (jg) in the Navy on October 30, 1942, and was immediately called up for service and left Canton on Navy duty on December 5, 1942. He was absent from canton on Navy duty except for two or three brief leaves until October 26, 1944.

Soon after his admission to practice dentistry in August 1942 Dr. Charles C. Cain became a salaried employee of his father who was then operating under the name of Cain & Cain. His name was placed on the office door at that time.

Some time between September 1, 1942, and January 1, 1943, an undated partnership agreement was signed between plaintiff Joseph M. Cain and his son, Charles C. Cain. Pertinent provisions of this agreement are set out in finding 5. According to its terms the plaintiff, Joseph M. Cain, was to contribute all the capital and equipment in the business that he had been conducting in the city of Canton, together with all the stock and merchandise used in the business, together with his experience and ability, and his son, Charles C. Cain, was to contribute all his knowledge, skill and ability, and both of such parties were to give all their time, experience and ability in the conduct and management of the business.

The contract by its terms was to become effective January 1, 1943. In the meantime, between August 1942, when he entered his father's office and the time he was called into the service on December 5, 1942, Dr. Charles C. Cain had married and the contract provided that in the event of the son's death all the property belonging to the partnership and used in carrying on the business, including the equipment, all stock in trade and all accounts and bank de-

posits, should immediately revert to and become the sole property of the plaintiff, Joseph M. Cain, the senior member of the partnership, including all the profits of the partnership at such time whether divided or not, and that the son's heirs, administrators, executors or assigns should have no interest therein. The contract further provided that in the event of the death of Joseph M. Cain, the senior member of the firm, his interest in the same should be administered according to law.

It was further provided that all monies received by the firm should be deposited in the First Trust and Savings Bank of Canton, Ohio, and each of the partners should have the right to write and execute checks on such account in the conduct and management of the business. The names of all three of the Cains were placed on the printed checks of Cain & Cain prior to January 7, 1943, and the grandfather, father, and son were authorized to sign checks. During the period, however, from August 1942 until early November 1944, no checks were drawn on such bank account by Dr. Charles C. Cain.

From December 5, 1942, to October 30, 1944, Dr. Charles C. Cain took no part in the operation or management of Cain & Cain except for minor services during two or three brief leaves from the Navy.

On October 30, 1944, Dr. Charles C. Cain, having returned from the service, practiced his profession with plaintiff in Canton, exercising all the rights, performing all the duties, and sharing equally in all profits of the business until August 1952 when his younger brother, Joseph H. Cain, became an additional partner.

The original agreement between plaintiff and Dr. Charles C. Cain had been cancelled in 1945 and a new agreement had been entered into providing for a new copartnership between plaintiff and Dr. Charles C. Cain without any restriction on Dr. Charles C. Cain's interest in the income or assets of the firm.

Dr. Joseph M. Cain called in an accountant who set up the usual account books for a partnership beginning January 1, 1943. Such books were maintained under the partnership name of Cain & Cain during all times material to this case. For the years 1943 and 1944 income tax returns were filed showing distributable income of the business in the amounts of $70,346.36 and $89,283.30 for those respective years. These amounts were shown to be distributable one-half to each partner, Joseph M. Cain and Charles C. Cain.

Plaintiff filed these returns and paid the taxes shown due thereon for himself and also caused to be filed a similar return in the name of his son, Dr. Charles C. Cain. He paid the taxes for each by check, charging the check for his son's taxes to the drawing account of Dr. Charles C. Cain.

In May 1947 the Commissioner of Internal Revenue ruled that no bona fide partnership recognizable for income tax purposes existed between Dr. Joseph M. Cain and Dr. Charles C. Cain in the years 1943 and 1944. He levied additional assessments against Dr. Joseph M. Cain, charging him with the entire receipts, together with interest on the deficiency assessment. The details are set out in findings 11, 12, 13, 14, 15, and 16. Credit was given against the additional assessment by the application of the payment that had been made in the name of Charles C. Cain, which had first been placed in a suspension account. The final adjustment was made on April 26, 1948.

On March 13, 1950 plaintiff filed claims for refund for the years 1943 and 1944.

Plaintiff's claim for refund for the year 1944 was rejected on November 17, 1950. At the time of filing the petition the refund claim for the year 1943 had not been acted on.

Plaintiff sues for the refund which he claims is due for each of the two years.

Both parties have cited the decision of the Supreme Court in the case of *Commissioner* v. *Culbertson*, 337 U. S. 733. After a careful reading of the decision in that case we do not believe that plaintiff brings himself within the framework of that decision for the period between January 1, 1943, and October 30, 1944. We quote the following language from pages 739, 740, and 742:

> * * * If it is conceded that some of the partners contributed neither capital nor services to the partnership during the tax years in question, * * * it can hardly be contended that they are in any way responsible for the production of income during those years.[6]
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> * * *
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> To hold that "Individuals carrying on business in partnership" includes persons who contribute nothing during the tax period would violate the first principle of income taxation: that income must be taxed to him who earns it. *Lucas* v. *Earl*, 281 U. S. 111 (1930); *Helvering* v. *Clifford*, 309 U.S. 331 (1940); *National Carbide Corp.* v. *Commissioner*, 336 U. S. 422 (1949).
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[6] Of course one who has been a bona fide partner does not lose that status when he is called into military or government service, and the Commissioner has not so contended. On the other hand, one hardly becomes a partner in the conventional sense merely because he might have done so had he not been called. The question is not whether the services or capital contributed by a partner are of sufficient importance to meet some objective standard supposedly established by the *Tower* case [*Commissioner* v. *Tower*, 327 U. S. 280], but whether, considering all the facts—the agreement, the conduct of the parties in execution of its provisions, their statements, the testimony of disinterested persons, the relationship of the parties, their respective abilities and capital contributions, the actual control of income and the purposes for which it is used, and any other facts throwing light on their true intent—the parties in good faith and acting with a business purpose intended to join together in the present conduct of the enterprise.

> * * * The intent to provide money, goods, labor, or skill sometime in the future cannot meet the demands of §§ 11 and 22 (a) of the Code that he who presently earns the income through his own labor and skill and the utilization of his own capital be taxed therefor. The vagaries of human experience preclude reliance upon even good faith intent as to future conduct as a basis for the present taxation of income. * * *

The facts in the instant case are clearly distinguishable in vital respects from the facts in the *Culbertson* case.

The facts in the *Culbertson* case show that for many years prior to 1939 the firm of W. O. Culbertson and R. S. Coon had operated a cattle business. At that time Culbertson was 79 years old and in ill health, and decided to dissolve the partnership. The major portion of the cattle was sold, leaving only about 1,500 head of registered Herefords which Culbertson wished to keep, and for which he offered Coon $65 per head. Coon agreed to sell at that price, but only on condition that Culbertson would sell an undivided one-half interest to his four sons at the same price. His reasons for imposing the condition were his intense interest in maintaining the strain which he and Culbertson had developed, his conviction that Culbertson was too old to carry on the work alone, and his personal interest in the Culbertson boys. The deal was made and two days later Culbertson sold an undivided one-half interest to the four boys and the following day they gave their father a note for $49,720 at 4 percent interest, due one year from date. The note was later increased to cover an additional purchase. It was paid partly by gift from the respondent, but the major portion was paid from the profits from the operation of the ranch.

At the time of the formation of the new partnership Culbertson's oldest son was 24 years old, married and living on the ranch. For the previous two years he had

been foreman under the Coon and Culbertson partnership. He was a college graduate and received $100 per month, plus board and lodging for himself and his wife both before and after the formation of Culbertson and Sons, and until he entered the Army. The second son was 22 years old and finished college in 1940, the first year during which the new partnership operated. He went directly into the Army following his graduation and rendered no services to the partnership before entering the service. The two younger sons, who were 18 and 16 years old, respectively, in 1940, went to school in the winter and worked on the ranch during the summer.

In the instant case the plaintiff's son, Dr. Charles C. Cain, worked for his father's firm on a salary from early August until he was called into the service on December 5, 1942. At the time of signing the agreement some time after September 1, 1942, he and his father had full knowledge that he was to be called into the service; in fact, he had received a commission as probationary ensign while still in dental school prior to the signing of the agreement and was commissioned a lieutenant (jg) in the Navy on October 30, 1942. Both father and son knew that he would be called into the service. The agreement by its terms was to be effective January 1, 1943. Both plaintiff and his son knew that he would not be able to make any contribution to the partnership as such until after his return from the service. The father took pains by the terms of the agreement to provide that should the son die during his period of service all of the equipment, all of the property of the partnership should immediately revert to plaintiff.

We do not believe the facts justify a division of the profits of the firm during the period of the son's service.

We have no doubt that the father had all along planned from the date of Charles' birth for him ultimately to become a member of the firm. We have no doubt that

the young man from the day he reached the years of discretion probably had the same intention.

We find that notwithstanding the effective date recited in the agreement it remained executory until Charles C. Cain returned from the service in October 1944.

There are additional facts that tend to justify this conclusion. Some time during the year 1945 the old agreement was discarded and a new and full time partnership was established without the restrictions which were contained in the old agreement as to the reversion of the son's interest in the firm.

During all the period of the son's service prior to October 30, 1944, he did not write any checks on the firm's account. The father paid the son's income tax as shown on the return which he had prepared. He paid some premiums on the son's insurance. He paid for a trailer to be sent to the son, costing some $700; all of these items were paid by checks written by the plaintiff and charged to the account of the son.

When the younger brother entered the firm of Cain & Cain in 1952 and the partnership books were closed, the plaintiff's investment account was overdrawn on the books of the firm by $31,652.53 and there stood to the credit of Dr. Charles C. Cain the sum of $34,898.14. The plaintiff gave to Charles C. Cain a note in the sum of $66,550.67 which eliminated plaintiff's deficit and entitled him to the balance standing to the credit of Dr. Charles C. Cain. By September 1954, when the proof in this case was closed, the above note had not been paid.

In the light of all the facts and circumstances we find that no real contribution was made by the son, Charles C. Cain, until he returned from the service and took up his work on October 30, 1944; that the full control of the business in reality was retained by the plaintiff, and that

the Commissioner of Internal Revenue properly charged the profits during that period to the plaintiff.

In the light of the new contract that was signed in 1945 without restriction the Collector of Internal Revenue permitted the filing of returns by the individual partners on the basis of a full partnership, effective January 1, 1945.

We find that since Dr. Charles C. Cain returned and became fully active in the firm on October 30, 1944, writing checks, performing professional services, participating in the management, and acting the part of a full-time partner, the plaintiff should have been permitted to file partnership returns for the period from October 30, 1944, to January 1, 1945.

Plaintiff is entitled to judgment for the overpayment for that particular period. The record does not justify a refund for any other part of the period claimed.

Judgment is suspended pending the filing of a stipulation by the parties as to the amount of the refund as calculated on a partnership basis for that period of slightly more than two months. In the absence of such a stipulation the case will be referred to a commissioner of this court for the taking of further evidence limited to the proper refund for that particular period.

LARAMORE, *Judge*; MADDEN, *Judge*; WHITAKER, *Judge*, and LITTLETON, *Judge*, concur.

FINDINGS OF FACT

The court, having considered the evidence, the briefs and arguments of counsel, and the report of Commissioner Willam E. Day, makes the following findings of fact:

1. The plaintiff, a resident of Canton, Ohio, has been a licensed dentist in that city since 1915. Upon graduation from dental college and subsequent license to practice, he

became a partner of his father, Dr. H. O. Cain. Dr. H. O. Cain gradually withdrew from the practice of dentistry until 1941, at which time he devoted his entire time to banking matters. The partnership name, Cain & Cain, was continued in use by the plaintiff who, during 1943 and 1944, employed other dentists on a salary. He also operated a dental laboratory for the making of artificial dentures, as had the partnership for a long time previously. During all times herein material, Cain & Cain had seven or eight employees.

2. Dr. Charles C. Cain, plaintiff's son, was born July 10, 1916. From the time Charles C. Cain was a boy, plaintiff anticipated his entry into partnership with plaintiff in the practice of dentistry at Canton, and held out the prospect of such a partnership as an inducement to Charles C. Cain to prepare himself well for the profession. During his school years, Charles C. Cain worked occasionally in the laboratory of Cain & Cain when at home on vacations.

3. Dr. Charles C. Cain graduated from dental school in June 1942, and was admitted to practice his profession in Ohio on August 5, 1942. Between his graduation from dental school and his admission to practice, he had gotten married, and after a short wedding trip took his State board examination. While in dental school, he had received a Navy commission as a probationary ensign and was commissioned a lieutenant (jg) in the Navy on October 30, 1942. He was immediately called up for service and left Canton on Navy duty on December 5, 1942. He was thereafter absent from Canton, except for two or three brief leaves of absence, until a few days after October 26, 1944. He was formally released to inactive duty from the Navy on December 4, 1944.

4. Upon his admission to practice dentistry, Dr. Charles C. Cain became a salaried employee of his father who

was then operating under the name, Cain & Cain. His name was placed on the office door at that time.

5. Sometime between September 1, 1942, and January 1, 1943, a partnership agreement was executed between the plaintiff Joseph M. Cain and his son, Charles C. Cain. Such agreement provided in part as follows:

ARTICLE THREE

The said Joseph M. Cain shall contribute all the capital and equipment in the business that he has been conducting in the practice of dentistry in the city of Canton, Ohio, together with all the stock and merchandise used in said business together with his experience and ability, and the said Charles C. Cain shall contribute all his knowledge, skill and ability, and both of said parties are to give all their time and experience and ability in the conduct and management of said business.

ARTICLE FOUR

Said partnership shall continue until such time as the parties mutually agree to terminate it or until the decease of one of the partners.

In the event of the death of Charles C. Cain, one of the partners, all the property belonging to said partnership and used in carrying on the business, including the equipment, all stock in trade and all accounts and bank deposits, shall immediately revert to and become the sole property of Joseph M. Cain, the senior member of said partnership. This provision shall apply to all the profits of the partnership at said time, whether divided or not, and to his share of all profits not withdrawn from said partnership by said Charles C. Cain, and all his interest of every kind in said partnership shall terminate immediately upon his death, and his heirs, administrators, executors or assigns shall have no interest therein.

In the event of the death of Joseph M. Cain, the senior member of said partnership, his interest in the same shall be administered according to law.

* * * * *

ARTICLE SEVEN

All monies received by said partners, or either of them, from said business, or in any way connected therewith, shall be deposited in The First Trust & Savings Bank of Canton, Ohio, and each of said partners shall have the right to write and execute checks on said account in the conduct and management of said business.

ARTICLE EIGHT

Each partner agrees that all gain profits arising from said business shall, from time to time, during the continuation of said partnership, be equally divided between said partners, share and share alike, and all losses and expenses that are incurred in said business shall be paid and born[e] equally between the said partners.

ARTICLE NINE

It is further understood and agreed between the parties hereto, and Dr. Henry O. Cain, that the Partnership pay said Dr. Henry O. Cain One Thousand Dollars ($1,000.00) per year for the right to secure his professional advice and guidance, and that same be deducted from the profits of the partnership before allocation of said profits to the individual partners.

6. Dr. Charles C. Cain's name was added to the names of Dr. Joseph M. Cain and Dr. H. O. Cain on the printed checks of Cain & Cain sometime prior to January 7, 1943. Dr. Charles C. Cain had signed signature cards at the

bank and was accordingly authorized to sign checks from August 3, 1942, along with his father and grandfather. During the period from August 1942 until November 6, 1944, however, no checks were drawn on such bank account by Dr. Charles C. Cain.

7. Dr. Charles C. Cain, being absent from Canton, took no part in the operation or management of Cain & Cain during the period from December 5, 1942, until October 30, 1944, except for minor services during his two or three brief leaves from the Navy. Beginning October 30, 1944, and continuously thereafter, Dr. Charles C. Cain regularly practiced his profession with the plaintiff, taking an active part in the management and control of the affairs of the office such as ordering materials, paying bills by check, performing all the duties of a partner, and sharing equally in the profits until August 1952, when his younger brother, Joseph H. Cain, became an additional partner. The original agreement between plaintiff and Dr. Charles C. Cain had been cancelled in 1945, and a new agreement had been entered into providing for a copartnership of plaintiff and Dr. Charles C. Cain, without restriction on Dr. Charles C. Cain's interests in the income or assets of the firm. The Internal Revenue Bureau recognized Dr. Charles C. Cain as a full partner with the plaintiff from and after January 1, 1945.

8. Dr. Joseph M. Cain called in an accountant who set up the usual account books for a partnership, beginning January 1, 1943. Such books were maintained under the partnership name, Cain & Cain, during all times material herein.

9. On March 15, 1944, and March 15, 1945, information returns of income were filed under the name of Cain & Cain as a copartnership, showing distributable incomes of the business in the amounts of $70,346.36 and $89,283.30 for the calendar years 1943 and 1944, respectively.

The amounts shown distributable to the copartners, plaintiff and Dr. Charles C. Cain, were $35,173.18 to each for 1943 and $44,641.65 to each for 1944.

10. Plaintiff regularly filed his Federal income tax returns for the calendar years 1943 and 1944 and paid the taxes shown due thereon. Plaintiff also caused to be filed similar income tax returns in the name of Dr. Charles C. Cain and paid the taxes shown due thereon with checks chargeable to the drawing account of Dr. Charles C. Cain in the firm of Cain & Cain. The returns reported the distributable income of Cain & Cain as one-half plaintiff's and one-half Dr. Charles C. Cain's.

11. In May 1947, the Commissioner of Internal Revenue ruled that no bona fide partnership, recognizable for income tax purposes, existed between Dr. J. M. Cain and Dr. Charles C. Cain in 1943 and 1944. The Commissioner thereupon added to plaintiff's reported net income for 1943 the amount of $32,673.75 which had been reported as Dr. Charles C. Cain's distributable share of the income of Cain & Cain. The Commissioner added to plaintiff's income for 1944 the amount of $41,141.65, representing the reported share of the income of Dr. Charles C. Cain from the firm of Cain & Cain for that year. As a result thereof, a ninety-day deficiency letter was issued to plaintiff on November 5, 1947, proposing assessment of additional taxes against plaintiff for the years 1943 and 1944 in the amounts of $25,303.20 and $33,696.14, respectively. The Commissioner's determinations of deficiencies were not appealed by plaintiff to the United States Tax Court.

12. On March 11, 1948, the proposed additional assessments were made against the plaintiff, together with interest thereon in the amounts of $5,544.29 for 1943 and $8,436.14 for 1944.

13. Payment of the 1943 deficiency so assessed, with interest thereon, was made by the plaintiff at the following times and in the following manner:

1943		
Oct. 3, 1947	$19,347.46	Cash (see finding 16)
Oct. 26, 1948	57.65	Credit from 1945 overpayment
Nov. 12, 1948	11,442.38	Consent credit from overpayment of Dr. Charles C. Cain for 1943
	30,847.49	

14. There was no evidence adduced with respect to payment by the plaintiff of the 1944 deficiency so assessed with interest thereon. However, the defendant has admitted that payment was made by the plaintiff for that year in the amounts and at the times indicated below:

1944		
Oct. 8, 1948	$5,126.35	Consent credit from overpayment of Dr. Charles C. Cain for 1943
Oct. 8, 1948	3,959.97	Consent credit of interest payable to Dr. Charles C. Cain on his overpayment of 1943 income tax
Mar. 14, 1949	22,690.50	Consent credit from overpayment of Dr. Charles C. Cain for 1944
Mar. 14, 1949	4,064.08	Consent credit of interest on overpayment of Dr. Charles C. Cain for 1944
May 13, 1949	4,146.62	Cash

15. The consent credits from overpayment of Dr. Charles C. Cain referred to in the two preceding findings were made with his written consent. Such overpayments, plus interest thereon, were attributable to the Commissioner's determination that Dr. Charles C. Cain was not a bona fide partner for tax purposes in Cain & Cain for 1943 and 1944.

16. The cash payment of $19,347.46 made by plaintiff on October 3, 1947, was placed by the Collector of Internal Revenue for the 18th District of Ohio in his 9D Suspense Account, in which money paid in by a taxpayer was cus-

tomarily held waiting its application on an assessment to be subsequently made. The contemplated additional assessment was made on March 11, 1948, and plaintiff's payment of October 3, 1947, was transferred from the Collector's 9D Suspense Account and applied against the additional assessment on April 26, 1948.

17. On March 13, 1950, plaintiff filed claims for refund for the years 1943 and 1944, setting forth as the basis of said claims that a bona fide partnership existed between plaintiff and Dr. Charles C. Cain in the years 1943 and 1944 and that the net income of the partnership reported as distributable in those years to Dr. Charles C. Cain was his taxable income and not that of the plaintiff.

18. The Commissioner of Internal Revenue has not formally acted upon plaintiff's claim for refund filed for 1943, but on November 17, 1950, he rejected plaintiff's claim filed for 1944. Plaintiff's petition was filed in this court on November 19, 1951.

19. During 1943 and until October 29, 1944, plaintiff continued the sole management, operation, and control of the business or profession known as Cain & Cain as he had immediately prior thereto. Dr. Charles C. Cain contributed neither capital nor substantial service to the business in those years. His heirs, assignees or administrators could claim no interest whatever in the accumulated or current income or assets of Cain & Cain at that time in case Dr. Charles C. Cain died.

20. During the year 1943 there was withdrawn from the capital account shown as Dr. Charles C. Cain's on the books of Cain & Cain a total amount of $16,155.71, all by checks signed by plaintiff. Of the total withdrawals from Dr. Charles C. Cain's account in 1943, $15,156.28 represented personal income tax payments, the liability for which was attributable to his purported share in the profits of Cain & Cain for that year. The other withdrawals

represented fraternal dues and insurance premiums, except for one check made payable to Western Union for $703.25 cash forwarded to Dr. Charles C. Cain.

21. During the year 1944 there was withdrawn from the capital account shown as Dr. Charles C. Cain's on the books of Cain & Cain a total amount of $19,080.78, all by checks signed by plaintiff. Of the total withdrawals from Dr. Charles C. Cain's account in 1944, $18,006.72 represented personal income-tax payments, the liability for which was attributable to his purported interest in Cain & Cain for that year. The other withdrawals represented fraternal dues and insurance premiums.

22. The information income returns filed for Cain & Cain as a partnership for 1943 and 1944 were prepared and filed under the direction of the plaintiff. The same is true as to returns filed on behalf of Dr. Charles C. Cain. Checks covering income-tax liability of Dr. Charles C. Cain for those years were signed by plaintiff and were drawn on the account of Cain & Cain. Dr. Charles C. Cain signed no checks for any purpose on the Cain & Cain account until November 6, 1944, after his return from Navy service.

23. When the additional partner entered the firm of Cain & Cain in 1952 (see finding 7), when the partnership books were closed the plaintiff's investment account was overdrawn on the books of the firm by $31,652.53, and there stood to the credit of Dr. Charles C. Cain the sum of $34,898.14. The evidence shows that the plaintiff gave to Dr. Charles C. Cain a note in the sum of $66,550.67 which eliminated plaintiff's deficit and entitled him to the balance of $34,898.14 standing to the credit of Dr. Charles C. Cain. By September 1954, when the proof in this case was closed, the above note had not been paid.

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes that as a matter of law the plaintiff is entitled to recover.

Entry of judgment is suspended pending the filing of a stipulation by the parties, or, in the absence thereof, the filing of a report by a commissioner of the court showing the amount due plaintiff in accordance with this opinion.

"APPENDIX B"

Statutes

Section 182, Internal Revenue Code of 1939—Title 26 USCA 22—53 Statutes 69, as amended by 56 Statutes 845.

> "In computing the net income of each partner, he shall include, whether or not distribution is made to him—
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> * * *
>
> (c) his distributive share of the ordinary net income or the ordinary net loss of the partnership, computed as provided in Section 183 (b)."

Section 187, Internal Revenue Code of 1939—Title 26 USCA 44—53 Statutes 70.

> "Each partner shall make a return of each taxable year, stating specifically the items of its gross income and the deductions allowed by this Chapter, and such other information for the purpose of carrying out the provisions of this Chapter as the Commissioner, with the approval of the Secretary may by regulations prescribe, and shall include in the return the names and addresses of the individuals who would be entitled to share in the net income, if distributed and the amount of the distributive share of each in-

dividual. The return shall be sworn to by any one of the partners."

Section 188, Internal Revenue Code of 1939—Title 26 USCA 45—53 Statutes 71.

"If the taxable year of a partner is different from that of the partnership, the inclusions with respect to the net income of the partnership, in computing the net income of the partner, shall be based upon the net income of the partnership for any taxable year of the partnership (whether beginning on, before, or after January 1, 1939) ending within or with the taxable year of the partner."

Section 3797, Internal Revenue Code of 1939—Title 26 USCA 507—53 Statutes 469.

"(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

* * *

(2) Partnership and partner—The term "partnership" includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation; and the term "partner" includes a member in such a syndicate, group, pool, joint venture, or organization."